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JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NAAMAN E. KING and MARIAN KING,
Petitioners

vs.

HILTON-DAVIS, a/k/a HILTON-DAVIS CHEMICAL CO.,
a Division of Sterling Drug, Inc.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUIS BELL
LIEBERT, SHORT & HIRSHLAND
1200 One Franklin Plaza
Philadelphia, PA 19103
(215) 557-4122

A Member of the Bar and
Attorney for Respondent

15pp

QUESTION PRESENTED

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY POWER OF REVIEW TO CONSIDER THE PREDICTIVE INTERPRETATION AND APPLICATION OF THE COMMON LAW OF PENNSYLVANIA BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PARTIES TO THE ACTION

RESPONDENT, HILTON-DAVIS, CONCURS IN THE PETITIONERS' IDENTIFICATION OF THE PARTIES TO THIS ACTION, BUT WOULD ADD IN COMPLIANCE WITH RULE 28.1 THAT STERLING DRUG, INC., A DELAWARE CORPORATION, BECAME A WHOLLY OWNED SUBSIDIARY OF EASTMAN-KODAK IN MARCH OF 1988.

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STATEMENT OF JURISDICTION

Contrary to the assertion of the petitioners that the jurisdiction of this Honorable Court is based upon 28 U.S.C. § 2101(c), this Honorable Court's jurisdiction is actually based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Hilton-Davis respectfully submits that no federal constitutional or statutory provisions are at issue in this matter. Rather, the petition before the Court calls for a discretionary consideration of what is substantively an issue of Pennsylvania common law.

Hilton-Davis frankly admits that it is at a loss to determine the application to the facts and circumstances of this matter of Amendment X to the Constitution of the United States as well as the Rules of Decision Act of 1789, 28 U.S.C. § 1652, as set forth in the Kings' Petition at page 2. Hilton-Davis would also note that neither of these provisions are referenced elsewhere in the Kings' Petition, nor have they been presented, much less argued, in the courts below.

COUNTERSTATEMENT OF THE CASE

The respondent, Hilton-Davis, incorporates as its counterstatement of the case the opinion of the United States Court of Appeals for the Third Circuit included as Appendix A to the Petition for Writ of Certiorari filed on behalf of the Kings, and reported under the caption *King v. Hilton-Davis* at 855 F.2d 1047 (3d Cir. 1988). However, the respondent would only wish to clarify that its product, Fusarex, is a sprout inhibitor rather than a sprout suppressant. The distinction between these two characterizations is that an inhibitor temporarily delays sprouting in seed

potatoes while a suppressant permanently terminates a potato's ability to sprout.

Hilton-Davis would also wish to oppose any implication in the Kings' Statement of the Case to the effect that the question resolved by the Court of Appeals was not raised before the Honorable Trial Court. To the contrary, a large portion of the Honorable District Court's opinion addresses the very issue decided by the Court of Appeals. *See King v. Hilton-Davis*, No. 85-877, slip op. at 2-7; Appendix C to the Petition for Writ of Certiorari at 21a-26a, inclusive. The respondent would also note that four issues not addressed by the Court of Appeals in its opinion or disposition of this matter have been briefed and preserved for appellate review in the event that the petitioners' Writ is granted.

SUMMARY OF THE ARGUMENT

The petitioners do not put before the Court either special and important reasons for granting this Petition, or an important question of federal law. Rather, the petitioners have misconstrued the lower court's predictive interpretation and application of Pennsylvania law as an issue calling for the discretionary review of this Court.

The Court's of Appeals interpretation and application of the substantive law is rationally based upon the well reasoned principles set forth in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986), *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110 (3d Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 156, 98 L. Ed. 2d 111 (1987), and *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir. 1987), *cert. denied*, ___U.S. ___, 108 S. Ct. 1472, 99 L. Ed. 701 (1988). Further, the lower court's reasoning is authoritative in the absence of a decision on the pertinent issue by the Supreme Court of Pennsylvania.

ARGUMENT

The petitioners expressly invoke the discretionary power of review of this Honorable Court as described in Rule of the Supreme Court of the United States 17.1(c). Petition at 13. As this Honorable Court is no doubt well aware, that Rule provides:

> **Rule 17. Considerations Governing Review on Certiorari.**
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> . . . .
>
> (c) When a state court or a federal court of appeals has decided an important question of *federal* law which has not been, but should be, settled by this Court, or has decided a *federal* question in a way in conflict with applicable decisions of this Court.

(Emphasis added.)

Petitioners have presented this matter as a direct application of this Honorable Court's decision in the case of *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986). However, unlike *East River, supra,* which involved the resolution of a conflict among the courts of appeals sitting in admiralty,[1] the case presently before the Court entails neither special and important reasons for granting this petition, nor an important question of federal law. Rather, this matter

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1. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, ___, 106 S. Ct. 2295, 2298, 90 L. Ed. 2d 865 (1986). *See, e.g., Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972).

involves Pennsylvania's common law of negligence, strict liability and warranty as predictively interpreted and applied by a federal court sitting in diversity. *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir. 1988) [Appendix A to the Petition]; *King v. Hilton-Davis*, No. 85-877, slip op. (E.D. Pa. Oct. 26, 1987) [Appendix C to the Petition]. Therefore, this matter falls into that category of cases in which this Honorable Court defers to lower federal courts on state-law issues. *E.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500, 105 S. Ct. 2794, 2800, 86 L. Ed. 2d 394 (1985); *Butner v. United States*, 440 U.S. 48, 58, 99 S. Ct. 914, 919, 59 L. Ed. 2d 136 (1979); *Cort v. Ash*, 422 U.S. 66, 72 n.6, 95 S. Ct. 2080, 2085 n.6, 45 L. Ed. 2d 26 (1975).

Indeed, scrutiny of most of the cases which the petitioners cite throughout their argument reveals the application of the substantive law of the various states, rather than important questions of federal law. Those cases, in the order set forth by petitioners, apply the substantive law of the following jurisdictions: *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110 (3d Cir. 1987), *cert. denied*, __ U.S. __, 108 S. Ct. 156, 98 L. Ed. 2d 111 (1987), Pennsylvania law; *Valley Farmers' Elevator v. Lindsay Bros. Co.*, 398 N.W.2d 553 (1987), Minnesota law; *Cincinnati Gas & Electric Co. v. General Electric Co.*, 656 F. Supp. 49 (S.D. Ohio 1986), Ohio law; *Anderson Electric Inc. v. Ledbetter Erection Corp.*, 115 Ill. 2d 146, 503 N.E.2d 246 (1986), Illinois law; *Streiff Jewelry Co. v. United Parcel Service, Inc.*, 670 F. Supp. 341 (S.D. Fla. 1987), Florida law; *Flow Industries v. Fields*, 683 F. Supp. 527 (D. Md. 1988), Maryland law; *Wood Products, Inc. v. CMI Corp.*, 651 F. Supp. 641 (D. Md. 1986), Maryland law; *Bancorp Leasing & Financing Corp. v. Augusta Aviation Corp.*, 813 F.2d 272 (9th Cir. 1987), Oregon law; *Richard O'Brien Companies v. Challenge-Cook Bros.*, 672 F. Supp. 466 (D. Colo. 1987), Colorado law; *Held v. Mitsubishi Aircraft International, Inc.*, 672 F. Supp. 369 (D. Minn. 1987), Texas law; *Frey Dairy v. A.O. Smith Harvestore Products, Inc.*, 680 F. Supp. 253 (E.D. Mich. 1988), Michigan law;

Consumers Power Co. v. Mississippi Valley Structural Steel Co., 636 F. Supp. 1100 (E.D. Mich. 1986), Michigan law; *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (1987), Florida law; *Wisconsin Power & Light Co. v. Westinghouse Electric Corp.*, 645 F. Supp. 1129 (W.D. Wisc. 1986), Wisconsin law; *City of Greenville v. W.R. Grace Co.*, 827 F.2d 975 (4th Cir. 1987), South Carolina law; and *Prairie Production, Inc. v. Agchem-Division-Pennwalt Corp.*, __ Ind. __, 514 N.E.2d 1299 (1987), Indiana law.

The only exception to the petitioners' application of state law lies in those cases cited by petitioners which rely upon maritime or admiralty law and, therefore, are directly controlled by *East River Steamship Corp., supra.*[2] There is no dispute but that this is not an admiralty or maritime case. The Honorable District Court and Court of Appeals applied their respective predictions of the law of the Commonwealth of Pennsylvania. Slip op. at 3 n.3 [Appendix C at 22a]; 855 F.2d 1017 at 1048 [Appendix A at 3a]. Petitioners do not now argue, nor have they ever argued, that the application of Pennsylvania law to this matter is improper.

Accordingly, it is not the law as announced by the Court in *East River Steamship Corp.*, which applies to this case, but that prediction of Pennsylvania law made by the Court of Appeals for the Third Circuit in *Aloe Coal Co. v. Clark Equipment Co., supra*, and applied by that same court to the facts and circumstances of this case. *East River* is only implicated to the extent that the court in *Aloe Coal* incorporated the principles discussed in *East River* into its prediction of future action by the Pennsylvania Supreme Court.

Wholly apart from the petitioners' failure to clearly define the applicable federal law in this instance is their

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2. *Ingram River Equipment, Inc. v. Pott Industries, Inc.*, 816 F.2d 1231 (8th Cir. 1987); *Gulf Boat Marine Services v. George Engine Co.*, 659 F. Supp. 6 (E.D. La. 1986); and *Ziddell, Inc. v. Cargo, Freight & Subfreight of Barge ZPC 404*, 661 F. Supp. 960 (W.D. Wash. 1987).

confusion of the basic substantive issue which they seek to put before the Court. Petitioners would have this Court review this matter and state that the fact finder, in this instance a jury, must decide "whether or not a defective product is a component part of a damaged product, thereby defining the buyer's available remedies in tort or warranty under *East River Steamship Corp. v. Transamerica Delaval, Inc.*, and its progeny." Petition at 12.

In *East River Steamship Corp., supra,* this Court set down the rule in admiralty cases that there is no recovery for economic losses in tort, and that damage to a product itself is such an economic loss. The United States Court of Appeals for the Third Circuit adopted the *East River* analysis in its predictive role of interpreting and applying the common law of Pennsylvania in the case of *Aloe Coal Co. v. Clark Equipment Co., supra.* The case at bar merely represents an application of those principles of *East River* and *Aloe Coal* in a different factual context:

> In *Aloe Coal,* we predicted that the Supreme Court of Pennsylvania would decline to follow a course that would severely restrict the ability of parties in commercial transactions to allocate the risk of purely economic losses and would leave a manufacturer with an open-ended and indefinite liability for such losses. The only factual difference between *Aloe Coal* and this case is that the plaintiff in *Aloe Coal* was attempting to recover economic loss from a manufacturer from whom it purchased directly, while the plaintiff here seeks to recover such loss from a component supplier who was remote from the plaintiff in the production and distribution chain. While we find a portion of the relevant Pennsylvania law uncertain, given the policy judgments we have predicted the Pennsylvania Supreme Court would adopt, we conclude that this factual distinction would not produce a different result.

King v. Hilton-Davis, 855 F.2d at 1053 [Appendix A at 13a-14a].

At present, there is no final word on the substantive legal issue addressed by the court below from the Pennsylvania Supreme Court which, of course, is the ultimate authority on Pennsylvania common law. In the absence of such a controlling precedent, the Court of Appeals for the Third Circuit has rationally predicted that which such a precedent from the Pennsylvania Supreme Court would state by applying the principles enunciated by this Court in *East River*.[3] Neither the petitioners in this case, nor in *Aloe Coal*, have stated legitimate grounds necessitating discretionary review by the Court.[4]

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3. The court concluded that there is no question that the Kings bargained for Fusarex-treated potatoes as opposed to potatoes, or Fusarex standing alone. *King v. Hilton-Davis*, 855 F.2d at 1053 n.4 [Appendix A at 13a n.4]. In view of this, the court determined that the Kings lost the expected performance of the seed potatoes, a conclusion borne out by the claimed loss of the crop rather than the value of the seed potatoes themselves. *See* 855 F.2d at 1052 [Appendix A at 12a]. Indeed, the court likened the Fusarex on the seed potatoes to a component in a machine thereby confirming the nonrecoverability in tort of the economic loss. 855 F.2d at 1052 [Appendix A at 12a], *citing*, *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1472, 99 L. Ed. 2d 701 (1988). Thus, the remedy for the petitioners lay in the warranty action which they permitted to slip from their grasp. 855 F.2d at 1049 [Appendix A at 5a]; *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d at 117-18. *See King*, *supra* at 1049 n.1 [Appendix A at 6a n.1].

4. As in the *Aloe Coal* case, a grant of certiorari on the facts and circumstances of this case would effectively place this Court in the position of reviewing the substantive law of each and every jurisdiction in the United States which has not dispositively ruled upon a given issue.

CONCLUSION

Petitioners, contrary to their express assertions, have failed to set before this Honorable Court either an important question of federal law, or a federal question decided in a manner which conflicts with applicable decisions of this Court. This case involves the interpretation and application of the common law of Pennsylvania by federal courts sitting in that Commonwealth and there are no special and important reasons necessitating review by this Court. The Court of Appeals properly applied the principles enunciated by this Court in *East River Steamship Corp. v. Transamerica Delaval, Inc., supra,* and incorporated by *Aloe Coal Co. v. Clark Equipment Co., supra,* to correct the error of the Honorable District Court. Respondent requests that this Court deny the petition for Writ of Certiorari.

Respectfully submitted,

LOUIS BELL
A Member of the Bar and
Attorney for Respondent,
Hilton-Davis Chemical Co.,
a Division of Sterling Drug, Inc.